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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEVIN ANDRES, Defendant and Appellant.	D053362 (Super. Ct. No. SCD205561)

APPEAL from a judgment of the Superior Court of San Diego County, Theodore M. Weathers, Judge. Affirmed.

Kevin Andres appeals from a judgment convicting him of the sale of cocaine base. He asserts the trial court erred (1) by giving a flight instruction without evidentiary support for flight, and (2) by giving several standard instructions that lessened the prosecution's burden of proof. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At about 6:00 p.m. on March 27, 2007, Officer Michael Day participated in an undercover narcotics "buy-bust" operation at the Chee Chee Club in downtown San Diego. Day, disguised as a drug user, saw Andres and another man (Cayles Chandler) standing next to each other in front of the club. Day asked Chandler if he had "a 20," meaning $20 worth of rock cocaine. Chandler nodded his head affirmatively at Day, and then nodded his head affirmatively at Andres. In response, Andres half-turned his body away from Day and pulled out a piece of black plastic from his pants pocket containing about eight to 10 pieces of rock cocaine. Andres asked Chandler how much rock cocaine he wanted. Chandler responded "a 20." Andres took one of the pieces of cocaine and started to break it into smaller pieces. While Andres was breaking up the cocaine, Chandler put out his hand and Day handed him a prerecorded $20 bill. After breaking the larger rock into four smaller pieces, Andres handed two of the pieces to Chandler, and Chandler handed the two pieces to Day. Andres then asked, "Where's the money[?]" Day responded that he gave "it to the brother in green," meaning Chandler.[1]

When Officer Day examined the two pieces of rock cocaine, he thought they were rather small for $20 worth. Day stated, to either Andres or Chandler, "Come on. I

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1 At trial Officer Day opined that Andres was so focused on breaking the rock cocaine into four pieces that he apparently did not see Day hand the money to Chandler. Day further explained that it was common for drug sellers to work as a team to avoid getting caught with both the money and the drugs; i.e., one person collects the money and the other person hands over the drugs.

wanted a fat 20," meaning a good chunk of cocaine. Andres responded, "What? Two good 10 pieces isn't good enough?"

During this transaction, the three men were in a "triangle shape" within arm's reach of each other, with Andres on Officer Day's right side, Day in the middle, and Chandler on Day's left side. Day testified there was ample lighting; he could see Andres's face; and he was "a hundred percent sure" that Andres was the person who provided the drugs.

After completing the transaction, Officer Day walked about 20 feet away from the entrance to the club and gave the arrest signal to the other members of the law enforcement team. Day relayed over his transmitter that the uniformed officers should arrest the African-American man wearing a green jacket (Chandler) and his companion, the African-American man wearing all black (Andres). Uniformed Officer Ricardo Rivas received the arrest signal and pulled up in front of the club in a marked police car. When Rivas arrived, Chandler and Andres were still standing in front of the club. Rivas saw Chandler looking towards the police vehicle. Before Rivas had time to exit his vehicle, Chandler turned around quickly and immediately went with Andres into the club.

Officer Day followed Chandler and Andres into the club and stood by a bathroom door to keep visual contact with them. Day never lost sight of the two men. Officer Rivas entered the club shortly thereafter. Day and Rivas saw Chandler and Andres walk to the rear of the club to sit down at a table. From his vantage point by the bathroom, Day spoke on his transmitter and gave instructions regarding the location and description of the two men. When Rivas arrived at the table, Chandler was walking towards a stool

to sit down and Andres had just sat down on a stool. Rivas arrested the two men. Day confirmed via his transmitter that the correct individuals had been arrested.

At the police station, after waiving his rights and agreeing to speak to the police about the incident, Andres stated, "I don't know what you're talking about. I'm a user. All I know is that someone told me to hand something to somebody." The $20 prerecorded bill used by Officer Day during the sales transaction was found in Chandler's possession. The police never found the other pieces of rock cocaine wrapped in the piece of black plastic that Day had observed in Andres's possession. While observing Andres at the club, Day tried to watch Andres's hands but did not see Andres toss anything away. However, Day assumed that Andres "ditched" the other pieces of rock cocaine in "some way," noting that they were in a bar with stools, pool tables, and other things.

Chandler, who was charged as a codefendant with Andres, pleaded guilty and then testified on behalf of Andres. Chandler testified that at about 4:45 p.m. on March 27, he bought $10 worth of cocaine base from a woman outside the Chee Chee Club. After making the purchase, he played pool in the club for about one hour, and then went outside to smoke some of his cocaine. Before he was able to use his drugs, he was approached by an undercover officer (Officer Day). Day asked him if he knew where he could get "a 20." Chandler did not respond. However, Chandler had his $10 worth of rock cocaine in his hand. Without being asked for money, Day put $20 in Chandler's hand. Chandler gave his cocaine to Day because he knew he could purchase twice as much cocaine with the money. When Chandler saw a police car come around the corner

towards the club, he went inside the club. He testified he was "in a bit of a rush" and "trying to escape notice of the police officers." Shortly thereafter, he was arrested.

Chandler acknowledged that he supports his cocaine addiction by being a middleman for people who are looking to purchase drugs. However, he testified that Andres was not standing near him outside the club during the drug transaction with Day. Chandler claimed he did not know Andres and Andres did not assist him in any fashion.

The jury convicted Andres of selling cocaine base. The trial court found Andres was addicted or in imminent danger of becoming addicted to narcotics, suspended execution of his sentence, and committed him to the California Rehabilitation Center.[2]

DISCUSSION

I. *Challenge to Flight Instruction*

Over defense objection, the jury was instructed that if it found Andres tried to flee immediately after the crime, it could infer consciousness of guilt from this conduct. (See CALCRIM No. 372.)[3] Andres contends the instruction should not have been given

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[2] At our request, the parties briefed the question of the extent to which appellate review is available when a defendant is committed to the California Rehabilitation Center. The parties agree, as do we, that appellate review is proper for issues that do not concern the defendant's sentence. (Pen. Code, § 1237, subd. (a); see *People v. Munoz* (1975) 51 Cal.App.3d 559, 563-564; *People v. Barnett* (1995) 35 Cal.App.4th 1, 3-4; *People v. Medrano* (2008) 161 Cal.App.4th 1514, 1518.)

[3] Based on CALCRIM No. 372, the jury was instructed: "If the defendant tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant tried to flee cannot prove guilt by itself."

because there was no evidence from which the jury could infer that his act of walking into the club after completing a drug transaction reflected a consciousness of guilt.

"[A] flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) Flight requires neither the physical act of running nor the reaching of a far-away haven; however, it requires a purpose to avoid being observed or arrested. (*Ibid.*) A mere departure from the crime scene does not necessarily show flight. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1244; *People v. Turner* (1990) 50 Cal.3d 668, 695; *People v. Clem* (1980) 104 Cal.App.3d 337, 344.) Rather, the circumstances of the departure should be examined to determine whether they warrant an inference of consciousness of guilt and an intent to avoid detection or arrest. (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1055; *People v. Turner*, *supra*, 50 Cal.3d 668, 695; *People v. Crandell* (1988) 46 Cal.3d 833, 867-868, abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

The flight instruction should be given if there is sufficient evidence from which a jury *could* infer the defendant fled out of guilty knowledge. (*People v. Lucas* (1995) 12 Cal.4th 415, 471.) The instruction leaves it to the jury to determine whether flight occurred, what weight to give the evidence, and whether there was an alternative explanation for the defendant's departure. (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1055; *People v. Lucas*, *supra*, 12 Cal.4th at p. 471.)

The evidence was sufficient for the jury to infer that Andres left the crime scene and entered the club with the purpose of avoiding arrest. After Officer Day completed the narcotics transaction in front of the club and gave the arrest signal, Officer Rivas pulled up to the club in a marked police vehicle. At this point, Chandler and Andres were still standing in front of the club where they had engaged in the narcotic sales. Rivas saw Chandler look towards the police vehicle and then immediately go into the club accompanied by Andres. From this evidence, the jury could reasonably infer that Chandler spotted the police vehicle, that Andres also saw the car or was alerted to its presence by Chandler, and that Andres entered the club because he wanted to avoid being identified and arrested as the person who had just conducted the sale. This inference was buttressed by the fact that Andres went to the rear of the club, which can be construed as an effort to distance himself from the crime scene in the hopes that the police would not know which person in the club had conducted the sale with Day. Chandler's testimony that he was "trying to escape notice of the police officers" also supported an inference that his companion, Andres, shared the same motive.

To support his challenge to the flight instruction, Andres contends that there was no evidence he saw the police vehicle, and no evidence of any communication between him and Chandler after the police vehicle arrived. Further, he points out that rather than leaving the scene, he entered the bar and sat down at a table, which "shows the opposite of an attempt to flee." These were matters for the jury to consider when deciding whether to find Andres did engage in flight, and what weight to give the evidence. However, they do not defeat the evidentiary support for the instruction.

The trial court did not err in giving the flight instruction.

II. *Challenge that Instructions Undermine the Prosecution's Burden of Proof*

Andres argues that several standard jury instructions (CALCRIM Nos. 220, 222, and 223) misled the jury in a manner that undermined the principle that the prosecution has the burden to prove guilt beyond a reasonable doubt. We find no error.[4]

In evaluating a claim that an instruction is ambiguous or misleading, we inquire whether there is a reasonable likelihood the jury misunderstood and misapplied the instruction. (*People v. Young* (2005) 34 Cal.4th 1149, 1202; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) We consider the instructions as a whole, not just in isolated parts. (*People v. Young*, *supra*, at p. 1202.) We assume the jurors are intelligent persons and capable of understanding and correlating all the instructions given to them. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

With these standards in mind, we consider Andres's specific contentions of instructional error relevant to the prosecution's burden of proof.

A. *CALCRIM Nos. 220 and 222*

Based on the language of CALCRIM No. 220, the jury was instructed on the prosecution's burden to prove guilt beyond a reasonable doubt as follows:

> "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. [¶] Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable

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4 Because we conclude the challenged instructions were not misleading, we need not address the People's contention that Andres has forfeited these claims of instructional error on appeal because he failed to raise them before the trial court.

> doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, *you must impartially compare and consider all of the evidence that was received throughout the entire trial*. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." (Italics added.)

Based on the language of CALCRIM No. 222, the jury was instructed on the definition of evidence as follows:

> "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. *Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence*. [¶] Nothing that the attorneys say is evidence . . . ."[5] (Italics added.)

Andres asserts that when CALCRIM Nos. 220 and 222 are read together, they suggest to the jury that it could only consider the evidence presented at trial, and it could not consider the *lack of evidence* when deciding whether the prosecution had carried its burden to prove guilt beyond a reasonable doubt. He acknowledges that instructing the jury to review all the evidence in the case was "not strictly incorrect," but asserts the instruction was incomplete and the jury should also have been told that reasonable doubt may arise from lack of evidence.

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5 CALCRIM No. 222 (given to the jury here) continues with a lengthy description of what is *not* evidence, including the attorneys' opening and closing arguments, the attorneys' questions to the witnesses (except to the extent the questions clarify the witnesses' answers), matters for which an objection was sustained, stricken testimony, and matters occurring when the court was not in session. The instruction further explains that the jury can ask that the court reporter's record be read to it; it must accept the court reporter's record as accurate; and stipulated facts must be accepted as true.

This contention has been repeatedly rejected by the appellate courts, including our own court. (*People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093; *People v. Campos*, *supra*, 156 Cal.App.4th at pp. 1237-1238; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1117-1119.) We agree with the holdings in these decisions. There is nothing in CALCRIM Nos. 220 and 222 that expressly or impliedly tells the jury it may not consider lack of evidence when deciding whether the prosecution has proven guilt beyond a reasonable doubt. CALCRIM No. 220 informs the jury of the prosecution's burden to prove guilt beyond a reasonable doubt, instructs the jury to evaluate all the evidence when making this determination, and admonishes the jury that if the evidence does not show guilt beyond a reasonable doubt the defendant is entitled to an acquittal. CALCRIM No. 222 defines evidence as the testimony, exhibits, and any other matters so defined by the court, and clarifies that attorney statements and other matters are not evidence. (See fn. 5, *ante*.) These instructions ensure that when the jury makes its determination, it considers all the evidence, it confines its evaluation to the properly admitted evidence, and it does not consider matters extraneous to the evidence. (*People v. Westbrooks*, *supra*, 151 Cal.App.4th at p. 1509.)

Advising the jury to make its determination on the evidence does not suggest that the jury cannot consider the prosecution's failure to present evidence to prove guilt. To the contrary, CALCRIM No. 220 tells the jury that it should acquit "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt." Telling the jury to acquit if the evidence does not prove guilt beyond a reasonable doubt, necessarily tells the jury that

there may be an absence of evidence warranting a not guilty verdict. (*People v. Campos*, *supra*, 156 Cal.App.4th at p. 1238.)

Andres's citation to *People v. Simpson* (1954) 43 Cal.2d 553 and *People v. McCullough* (1979) 100 Cal.App.3d 169 does not support his claim of error here. In *Simpson* and *McCullough* the trial court's instructions or statements to the jury suggested that reasonable doubt must arise from the evidence. (*Simpson*, *supra*, at p. 565; *McCullough*, *supra*, at p. 181.) The reviewing courts found error because reasonable doubt "may well grow out of the lack of evidence in the case as well as the evidence adduced." (*Simpson*, *supra*, at p. 566; *McCullough*, *supra*, at p. 182.) CALCRIM Nos. 220 and 222 do not tell the jury that doubt must arise from the evidence. Rather, as stated, these instructions tell the jury that it should consider only the admitted (as opposed to extraneous) evidence when evaluating guilt and it should acquit if the evidence does not show guilt beyond a reasonable doubt. (See *People v. Campos*, *supra*, 156 Cal.App.4th at p. 1238.)

Andres also challenges the statement in CALRIM No. 220 telling the jury to "impartially *compare* and consider all the evidence." (Italics added.) He asserts the reference to "compare" improperly instructs the jury to apply a preponderance of the evidence standard because it suggests the jury should weigh the opposing sides' evidence and determine guilt based on which sides' evidence carried more evidentiary weight. He notes that such a weighing approach is contrary to the principle that the prosecution alone carries the burden of proof beyond a reasonable doubt and that reasonable doubt

requiring acquittal may exist even if the defendant's evidence is weaker or the defendant presents no evidence.

This contention has also been repeatedly rejected by the appellate courts. (*People v. Stone* (2008) 160 Cal.App.4th 323, 331-332; *People v. Garelick, supra,* 161 Cal.App.4th at pp. 1117-1119; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1156-1157.) We agree with these decisions. CALCRIM No. 220 does not specifically direct the jury to weigh or compare *both sides'* evidence, but rather generally instructs the jury to consider and compare all the evidence. The reference to "compare" can apply to different evidentiary items submitted by the prosecution (which could, for example, contain inconsistencies), as well as to evidentiary submissions from the defense. There is nothing in CALRIM No. 220 that expressly or impliedly suggests the defendant must present evidence to support an acquittal or that the jury should convict if the defendant's evidence is weaker. Further, in addition to the statement in CALCRIM No. 220 that the prosecution must prove the defendant guilty beyond a reasonable doubt, numerous other instructions consistently reiterate that the burden is on the prosecution, with no mention that the defendant must present evidence or that a comparison should be made between

the parties' evidence.[6] Reading the instructions as a whole, there is no reasonable likelihood the jury interpreted CALCRIM No. 220's "compare and consider" language to mean the defendant had to present evidence to obtain an acquittal or that the determination of guilt should be derived from a weighing of the parties' respective evidence.

Coffin v. United States (1895) 156 U.S. 432, cited by Andres, does not support his challenge to the "compare and consider" language. In *Coffin*, the United States Supreme Court found instructional error because the court instructed the jury to "weigh[] all the proofs" but refused to instruct the jury on the presumption of innocence. (*Id*. at p. 461.) Here, the jury was instructed regarding the presumption of innocence in CALRIM No. 220. The error that occurred in *Coffin* did not occur here.

B. *CALCRIM No. 223*

Based on CALCRIM No. 223, the jury was instructed on direct and circumstantial evidence as follows:

> "Facts may be proved by direct or circumstantial evidence or by a combination of both. Direct evidence can prove a fact by itself. . . . [¶] Circumstantial evidence also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or

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6 To illustrate, the instructions included the following statements. "To prove that the defendant is guilty of this crime, *the People must prove* [the following elements] . . . ." (Italics added; see CALCRIM No. 2300.) "The defendant may not be convicted of any crime based on his out-of-court statement alone. . . . *You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt*." (Italics added; see CALCRIM No. 359.) "A defendant has an absolute constitutional right not to testify. *He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt . . . .*" (Italics added; see CALCRIM No. 355.)

> group of facts from which you may conclude the truth of the fact in question. . . . [¶] Both direct and circumstantial evidence are acceptable types of evidence *to prove or disprove the elements of a charge*, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence." (Italics added.)

Andres contends CALCRIM No. 223's reference to "disprov[ing]" the elements of the charges suggests that the defendant has the burden to disprove the charges, contrary to the rule that the burden of proof is entirely on the prosecution and the defendant need not present any evidence to obtain an acquittal. CALCRIM No. 223 does not discuss burdens of proof, and there is nothing in the instruction that suggests a defense duty to present evidence. As stated, the rule that the prosecution has the burden of proof was consistently and repeatedly set forth in other instructions to the jury with no suggestion that the defense had a duty to prove or disprove anything.

Further, the general statement in CALCRIM No. 223 that both direct and circumstantial evidence may be used to disprove the elements of the charge can apply to the prosecution's evidentiary presentation as well as to any evidentiary presentation the defendant might chose to make. For example, an item of evidence presented by the prosecution may disprove a factual claim or inference that the prosecution asserted from other aspects of its evidentiary presentation. There is no reasonable likelihood the jury interpreted CALCRIM No. 223's reference to "disprove" to undermine the explicit instructions that the prosecution has the burden to prove guilt beyond a reasonable doubt.

DISPOSITION

The judgment of conviction is affirmed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.